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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 232

HARRY B. NORDSTROM, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

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No. .....

HARRY B. NORDSTROM, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Harry B. Nordstrom, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on the 20th day of May, 1966.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported in P-H Federal Tax Reporter §66-318. A copy of said opinion may be found in Appendix A, p. 13. A copy of that Court's judgment may be found in Appendix B, p. 19. A copy of the Trial Court's findings and memorandum may be found in Appendix C, p. 20.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on the 20th day of May, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether Petitioner was deprived of the benefit of *Commissioner of Internal Revenue v. Wilcox*, 327 U.S. 404, 66 S. Ct. 546, 90 L. Ed. 752 (1946), and *James v. United States*, 366 U.S. 213 (1961), by the holding below that it constituted willful evasion of 1961 federal income tax when Petitioner did not report on his federal income tax return for 1961 the sum of $10,693.80 embezzled May 12, 1961, three days prior to the decision in *James v. United States*.

2. Whether Petitioner was deprived of due process of law by reason of vagueness in the law respecting alleged willful evasion of federal income taxes as to monies embezzled in 1961 prior to *James v. United States*, 366 U.S. 213 (1961).

CONSTITUTIONAL PROVISIONS INVOLVED

There is involved in this case the Due Process Clause of the Fifth Amendment to the United States Constitution.

STATUTE INVOLVED

There is also involved in this case Section 7201 of the Internal Revenue Code of 1954 which provides:

> "Attempt to evade or defeat tax. Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

STATEMENT OF THE CASE

Petitioner Harry B. Nordstrom was indicted on the 10th day of February, 1965 under Section 7201 of the Internal Revenue Code of 1954 for alleged willful evasion of federal income taxes for the years 1958, 1959, 1960 and 1961, inclusive. Petitioner reported his income on a calendar year basis.

Mr. Nordstrom entered a plea of "not guilty" as to each count of the indictment. The case was tried to the Court, the Honorable Earl R. Larson presiding, without a jury.

Petitioner had been General Purchasing Agent for the Great Northern Railway and in that capacity during the years in issue embezzled approximately $84,000 from the Railroad. These sums were not reported on Petitioner's income tax return, giving rise to the indictment. The defense at trial consisted of showing that the monies taken were embezzled so that the defendant was entitled to the benefit of the doctrine of *Commissioner of Internal Revenue v. Wilcox*, 327 U.S. 404, 66 S. Ct. 546, 90 L. Ed. 752, the monies having been embezzled before May 15, 1961, when the Supreme Court decided *James v. United States*, 366 U.S. 213, 81 S. Ct. 1052.

The tax returns of Petitioner for all years except 1961 were filed prior to the decision of the Supreme Court in the *James* case. As to the year 1961, the return was filed March 29, 1962. Petitioner reported taxable income for 1961 of $27,182.62 and paid a tax thereon of $7,999.27. The indictment claimed a taxable income of $37,807.72. The trial court found defendant not guilty as to the years 1958, 1959 and 1960 and guilty as to 1961.

Defendant committed only one act of embezzlement in 1961, and that was on May 12, 1961, when he embezzled the sum of $10,693.80. This was three days before the decision in the *James* case. In determining that defendant was guilty as to 1961 the trial court made the following findings:

> "Defendant executed the tax return for the calendar year 1961 on March 29, 1962, and filed it thereafter with the District Director of Internal Revenue Service in St. Paul. In his return for the year 1961 defendant did not include embezzled funds of $10,693.80 obtained on May 12, 1961." (Finding No. 24)
>
> * * *
>
> "The offense of willfully and knowingly attempting the evasion or defeat of a large part of the income tax owing by defendant for the calendar year 1961 by the filing of a false and fraudulent tax return was complete on or about March 29, 1962, when the fraudulent return was filed." (Finding No. 30)

The Trial Court sentenced Petitioner to three (3) years come tax return filed for the year 1961. On appeal the government conceded by stipulation that the defendant's acts constituted embezzlement. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

The issues here involved are special and important for the reason that the Court below decided a federal question in a way which directly conflicts with the decisions of this Court in *Commissioner v. Wilcox* and *James v. United States*, and in a way which deprived the Petitioner of his constitutional right to certainty in the law, so that his conviction constitutes a marked departure from the usual course of judicial proceedings and the requirements of fair play.

In *Commissioner of Internal Revenue v. Wilcox*, 327 U.S. 404, 66 S. Ct. 546 (1946), this Court in an eight-one decision held that embezzled monies were not taxable income.

In 1952 this Court in *Rutkin v. United States*, 343 U.S. 130, 72 S. Ct. 571, in a five-four decision decided that extortion proceeds did constitute taxable income.

In 1955 and after certiorari was denied in *Marienfeld v. United States*, 214 F. 2d 632 (8 Cir. 1954), cert. den. 348 U.S. 865, this Court refused certiorari in *Dix v. Commissioner*, 223 F. 2d 436 (2 Cir. 1954), cert. den. 350 U.S. 894 (1955), holding that embezzled monies did *not* constitute taxable income.

When this Court decided *James v. United States*, 366 U.S. 213, 81 S. Ct. 1052 (1961), on May 15, 1961, it did so in five separate opinions.

The principal opinion was written by the Chief Justice in which Justices Brennan and Stewart concurred. Those judges were of the view that *Wilcox* should be overruled but that the conviction of *James* should be reversed for the following reasons:

"We believe that the element of willfulness could not be proven in a criminal prosecution for failing to include embezzled funds in gross income *in the year of misappropriation* so long as the statute contained the gloss placed upon it by Wilcox *at the time the alleged crime was committed.* Therefore, we feel that petitioner's conviction may not stand and that the indictment against him must be dismissed." (Emphasis supplied." (pp. 220, 221)

The Chief Justice also stated:

". . . we believe that we should now correct the error and the confusion resulting from it, certainly if we do so in a manner that will not prejudice those who might have relied on it." (p. 220)

Three justices (Justices Black, Douglas and Whitaker) felt that *Wilcox* should still be the law. They thought that only people who embezzle funds "after the date of this opinion" will be liable for prosecution. They emphasized that the Court's decision left unclear the question of civil liability for past embezzlements. Justice Black in his opinion stated in part:

"Three Justices vote to overrule Wilcox under what we believe to be a questionable formula, at least a new one in the annals of this Court, and say that although failure to report embezzled funds has, despite Wilcox, always been a crime under the statute, people who have violated this law in the past cannot be prosecuted *but people who embezzle funds after this opinion* is announced can be prosecuted for failing to report these funds as a 'taxable gain'. Three other Justices who vote to overrule Wilcox say that past embezzlers can be prosecuted for the crime of tax evasion although two of those Justices believe the Government must prove that the past embezzzler did not commit his crime in reliance on Wilcox. Thus, although it was not the law yesterday, it will

> be the law tomorrow that funds embezzled hereafter are taxable income; and although past embezzlers could not have been prosecuted yesterday, maybe they can and maybe they cannot be prosecuted tomorrow for the crime of tax evasion." (Emphasis supplied.) (pp. 223, 224)

Justices Harlan and Frankfurter concurred in the reversal of *Wilcox* but dissented from the absolute reversal of the conviction as occurred in *James*. They pointed out that a complete reversal without a new trial "raises further questions as to the *civil liability* of one in the circumstances of this Petitioner". (Emphasis supplied.) (p. 247)

In *Armstrong v. United States*, 327 F. 2d 189 (9 Cir. 1964), that Court interpreted the Supreme Court's decisions as holding that embezzled funds would not constitute taxable income during the years 1956-1959. That Court said:

> ". . . we note that under decisions of the Supreme Court embezzled funds would not constitute taxable income during the tax years in question. James v. United States, supra; Commissioner of Internal Revenue v. Wilcox, 327 U.S. 404, 66 S. Ct. 546, 90 L. Ed. 752 (1946); Beck v. United States, supra."

In *Linkletter v. Walker*, 381 U.S. 618, 85 S. Ct. 1731 (1965), this Court clearly held that the effect of *James* was prospective only.

Mr. Justice Clark in a seven to two decision adverted to the prospective treatment accorded embezzled monies in the *James* case, stating:

> "That no distinction was drawn between civil and criminal litigation is not only shown by the language used in Schooner Peggy, supra, and Chicot County, supra, but also in such cases as State v. Jones, 44 N.M. 623, 107 P. 2d 324 (1940), and James v. United States, 366 U.S. 213, 81 S. Ct. 1052, 6 L. Ed. 2d 246 (1961). In the latter case,

this Court laid down a prospective principle in overruling Commissioner v. Wilcox, 327 U.S. 404, 66 S. Ct. 546, 90 L. Ed. 752 (1946), 'in a manner that will not prejudice those who might have relied on it.' At 221 of 366 U.S., 81 S. Ct. at 1056.[12] Thus, the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective. And 'there is much to be said in favor of such a rule for cases arising in the future.' Mosser v. Darrow, 341 U.S. 267, at 276, 71 S. Ct. 680, at 684 (dissenting opinion of Black, J.)"[1]

From May 16, 1961 through March 29, 1962 when the Petitioner here filed his income tax return for 1961, not one

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[1] Footnote 12 to the *Linkletter* decision explains:

"There was no mention of prospective overruling in the opinion, however three Justices voted to overrule Wilcox but reversed James' conviction because 'the element of willfulness could not be proven in a criminal prosecution for failing to include embezzled funds in gross income in the year of misappropriation so long as the statute contained the gloss placed upon it by Wilcox at the time the alleged crime was committed.' 366 U.S. 213, 221-222, 81 S. Ct. 1057. Mr. Justice Black and Mr. Justice Douglas concurred in the reversal of the conviction on the basis that Wilcox was right and therefore failure to include embezzled funds in taxable income was not a crime. However, Mr. Justice Black strongly disagreed with the prospective manner in which the overruling was done.

'One of the great inherent restraints upon this Court's departure from the field of interpretation to enter that of lawmaking has been the fact that its judgments could not be limited to prospective application. This Court and in fact all departments of the Government have always heretofore realized that prospective lawmaking is the function of Congress rather than of the courts. We continue to think that this function should be exercised only by Congress under our constitutional system.' 366 U.S., at 225, 81 S. Ct. at 1058.

"Compare the dissenting opinion of Mr. Justice Black in Mosser v. Darrow, 341 U.S. 267, 275, 71 S. Ct. 680, 684, 95 L. Ed. 927 (1951), where he stated that a new rule of trustee liability should not be applied retroactively. For discussion of these cases see Currier, supra, n. 2; Note 71 Yale L. J. 907."

decided case held that monies embezzled prior to *James* constituted taxable income for civil purposes.

When the Eighth Circuit Court of Appeals decided *Estate of Geiger v. Commissioner*, 352 F. 2d 221, in October, 1965 (three and one-half years after the Petitioner here filed his tax return for 1961), that Court recognized that the civil taxability of pre-*James* embezzled proceeds had not been decided in *James* itself. The Eighth Circuit in *Geiger* referred to *Wilcox*, *Rutkin* and *James* and said:

> "Our task is to ascertain, from these three cases, the attitude and teaching of the Supreme Court, as presently constituted, as to the taxability of funds embezzled subsequent to Rutkin but prior to James." (p. 224)

It further appeared from the *Geiger* decision that only civil tax deficiencies were involved and that the Commissioner of Internal Revenue conceded[2] that the 50% fraud penalty originally proposed should not have been claimed against the taxpayer there.

At the time Mr. Nordstrom filed his income tax return for 1961 he had no reason to think that those proceeds constituted taxable income from the standpoint of civil tax liability. Certainly, his failure to include those embezzled monies could not constitute willful evasion with respect to the year 1961.

Petitioner submits that *James* held that only those embezzling funds after May 15, 1961 would have taxable income, as to which the failure to report would constitute willful evasion. If that was not this Court's decision, then the state of the law was left so unclear as to be violative of due process in the charge of a felony for failure to report monies embezzled prior to *James*.

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[2] See footnote 1 of the *Geiger* decision.

As Mr. Justice Douglas so aptly stated in *Ashton v. Kentucky*, —— U.S. ——, 34 Law Week 4398 at 4400 (May 16, 1966):

"Vague laws in any area suffer a constitutional infirmity."

This infirmity cannot be healed by the happenstance that the vagueness arose by reason of judicial decision rather than legislative enactment.

In *Jordon v. DeGeorge*, 341 U.S. 223, 71 S. Ct. 703 (1951), this Court said:

> "The essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct.. . . The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." (pp. 230, 231, 232)

In *Connally v. General Construction*, 269 U.S. 385, 46 S. Ct. 126 (1926), this Court announced:

> ". . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." (p. 391)

To like effect are *Pierce v. United States*, 314 U.S. 306, 311, 62 S. Ct. 237, 239 (1941); *Winters v. People of State of New York*, 333 U.S. 507, 68 S. Ct. 665, 670 (1947); and *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S. Ct. 618 (1939).

The Court below asserted:

> "It would be ludicrous to believe that appellant embezzled funds in reliance upon the apparent nontaxability of the proceeds."

Nothing could be further from the truth. The government in the *Wilcox* and *James* cases argued that the law should not favor embezzlers for the very reason that the state of the law *would* encourage embezzlement. Indeed, it is not without significance here that after the *James* decision the Petitioner committed no further acts of embezzlement.

While in the opinion of the Eighth Circuit no tax preference should be accorded ill-gotten gains, that is not the issue. The only issue is whether under the state of the law at the time of the filing of his tax return for 1961 Petitioner must have known that he was certainly and specifically required to include monies embezzled prior to *James* in his return for that year.

The Eighth Circuit attempted to decide the matter by avoiding the *James* case. The Court below said:

> ". . . at the time of the James decision, it was apparent to all that the decision in Wilcox had been undercut, limited and construed to the point that its effectiveness had been all but destroyed."

Certainly, if such had been the case this Court would not have had such difficulty in putting aside the *Wilcox* doctrine in *James*.

At the time of the actual embezzlement in 1961 *Wilcox* was the law of the land. At the time when Petitioner filed his return for 1961 the *James* case had been decided. It was *James* and not *Rutkin* which overturned *Wilcox*. The Circuit Court opinions following the decision in *Rutkin* were not uniform with respect to the impact of that case and could not preempt or flavor the importance of this Court's decision in *James*.

The issues here transcend the important question of whether as a matter of law willful income tax evasion was proved below. This case touches the bedrock constitutional question of whether any person can be convicted of a felony for alleged violation of a law while that law was obscured by such vagueness that men of common intelligence must guess at its meaning or differ as to its application.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 18,186

HARRY B. NORDSTROM, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the District of Minnesota.

[May 20, 1966]

Before MATTHES, MEHAFFY and GIBSON, Circuit Judges.

GIBSON, Circuit Judge.

Does the failure of a taxpayer to report funds embezzled on May 12, 1961, three days prior to the decision in *James* v. *United States*, 366 U.S. 213 (1961) and the failure to pay the tax due thereon in a return filed in March, 1962 constitute an unlawful willful evasion of income tax for the year 1961? The trial court found that it did. We affirm.

The appellant, Harry B. Nordstrom, as General Purchasing Agent for the Great Northern Railway, embezzled approximately $84,000 from his employer and did not report any of this amount on his calendar year returns for 1958, 1959, 1960, and 1961. Appellant was indicted for unlawful evasion of Federal income taxes in violation of § 7201 I.R.C. of 1954 for each of the above four years. In a trial without

jury, the United States District Court for the District of Minnesota, the Honorable Earl R. Larson, found appellant not guilty of unlawful evasion on income received in the years 1958, 1959, and 1960 under the doctrine of *Commissioner* v. *Wilcox*, 327 U.S. 404 (1946). The *Wilcox* decision held that money received from embezzlement was not taxable income. Therefore, failure to include embezzled sums in an income tax return would not constitute unlawful evasion. This was the law until May 15, 1961, and the trial court correctly held that appellant's returns filed prior to this date were proper insofar as criminal liabilities were concerned. On this date, however, *James* v. *United States*, 366 U.S. 213 (1961) specifically overruled the *Wilcox* decision and held that money received from embezzlement was indeed taxable income.

The trial court found that even though the final and only embezzlement in 1961 of approximately $10,000 came prior to the decision in *James*, the unlawful evasion occurred when the return was filed in March, 1962, some ten months after the decision in *James*. On this basis the trial court found appellant guilty of tax evasion for the year 1961. Defendant Nordstrom appeals from this judgment.

On the basis of *Linkletter* v. *Walker*, 381 U.S. 618 (1965) appellant argues that only prospective application should be given to the holding in *James*. Therefore, since the embezzlement in question occurred three days prior to *James*, this income should be considered nontaxable under the prior *Wilcox* doctrine. Appellant further argues that the *James* decision is vague and uncertain as to the criminal liability for failing to report prior embezzled funds, pointing out that this case required five opinions to express the feelings of nine justices. Due to this vagueness appellant argues that the Court cannot attribute to him the requisite intent to violate the tax law.

Appellant is charged with the crime of tax evasion. To be criminally liable on this charge, it first must appear that appellant was under a civil liability to pay the tax. In addition, his civil liability must have been so clearly the law at the time the erroneous return was filed that failure to report the embezzled funds amounted to a willful evasion.

As to the first point we believe there is no doubt. The *James* decision clearly held that embezzled money is taxable income of the embezzler in the year of the embezzlement. (See the syllabus of the Court, *James* v. *United States*, supra.) A proper reading of this case clearly indicates that the Court intended such proceeds to henceforth be taxed whether the embezzlement came prior to or following the date of the decision. This Court has so held. For a thorough discussion of this point see Judge Blackmun's opinion in *Estate of Geiger* v. *Commissioner*, 352 F. 2d 221 (8 Cir. 1965). See also, *Estate of Adame* v. *Commissioner*, 320 F. 2d 811 (5 Cir. 1963). *James* was to have retroactive application for the determination of civil tax liability.

We do not believe this holding has been altered in any way by the Supreme Court's recent expression in the *Linkletter* case. *Linkletter* dealt with the problem of failure to afford presently recognized Constitutional protections to criminal defendants at a time prior to their specific recognition by the Supreme Court. Neither the facts nor the reasoning of *Linkletter* have application to the retroactive determination of civil tax liability. It is within the power of a court to rule that a tax liability attached to income earned, or possessed with intent of use, in the past and must be reported in the future. Furthermore, it cannot even be said that this tax liability is unfair to appellant, because it would be ludicrous to believe that appellant embezzled funds in reliance upon the

apparent nontaxability of the proceeds. Also, there appears to be no sound reason why tax preference should be accorded ill-gotten gains.

As to the second point, we believe that this civil tax liability was readily apparent to appellant at the time he filed his income tax return, thus making his willful failure to include this income, unlawful evasion. A perusal of the statute finds a noticeable absence of any provision holding only legally earned income taxable. Thus appellant's literal reading of the statute would indicate to him that all income, be it legal or illegal, is subject to tax. The statute has repeatedly been so interpreted by the Federal Courts, as appellant's imputed knowledge of the law would have told him. *United States* v. *Sullivan*, 274 U.S. 259 (1927); *Johnson* v. *United States*, 318 U.S. 189 (1943). The position of the courts has been founded upon the legislative history of this portion of the internal revenue law. In amending the Income Tax Act of 1913, the 1916 amendment dropped the qualifying word "lawful." The obvious intent of Congress was to tax all types of income, legal and illegal. In 1946 the *Wilcox* decision made an exception to the general rule found in the statute and the prior cases by holding that embezzler's proceeds were not truly income. The subsequent decision in *Rutkin* v. *United States*, 343 U.S. 130 (1952) clearly indicated that *Wilcox* was indeed an isolated exception. *Rutkin* specifically limited *Wilcox* to its facts and undercut any force it may have had by holding that, unlike embezzlement, proceeds from extortion would be taxable income.

The feeling was widespread that the *Rutkin* decision absolutely repudiated *Wilcox* and as a consequence lower Federal courts made every attempt to avoid the effect of *Wilcox* by endeavoring to find some distinguishing characteristic. See,

Marienfeld v. *United States*, 214 F. 2d 632 (8 Cir. 1954); *Kann* v. *Commissioner*, 210 F. 2d 247 (3 Cir. 1953); *Macias* v. *Commissioner*, 255 F. 2d 23 (7 Cir. 1958); *United States* v. *Wyss*, 239 F. 2d 658 (7 Cir. 1957); *Briggs v. United States*, 214 F. 2d 699 (4 Cir. 1954). Therefore, at the time of the *James* decision, it was apparent to all that the decision in *Wilcox* had been undercut, limited, and construed to the point that its effectiveness had been all but destroyed. In fact the Court in *James* states, "the *Wilcox* rational was effectively vitiated by this Court's decision in *Rutkin*."

With this background, upon the handing down of the *James* decision it should have been abundantly clear that the last vestiges of *Wilcox* were being destroyed. The remnants of *Wilcox* were finally and absolutely repudiated to the point that no one could thereafter place any reliance on its pronouncements.

The opinion of the Court in *James* clearly held that embezzled money was taxable in the year of the embezzlement, but the conviction of James himself was reversed simply because at the time the return was filed, *Wilcox* was the controlling law. By its action here and the accompanying language the Court gave notice to all that any future failures to report embezzled funds, regardless of the time they were embezzled, would subject the embezzler to criminal liability under the Federal tax law.

Therefore, taking the *James* case, not necessarily in isolation, but in the context of the statutory wording and subsequent interpretation, the *Rutkin* decision, and the Circuit Court opinions following the decision in *Rutkin*, we believe that appellant had proper notice of his tax liability at the time he filed his 1961 return. Therefore, a willful failure to include these funds as income on his 1961 return would con-

stitute a violation of § 7201. The trial court's legal conclusion is correct.

The trial court further found that appellant willfully and knowingly attempted to evade a large part of the income tax due and owing by him by filing a false and fraudulent income tax return which failed to include therein substantial income which he knew he had received during the calendar year 1961. This factual determination is fully supported by the record.

Judgment affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

CRIM. JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 18,186
September Term, 1965

HARRY B. NORDSTROM,
Appellant,
vs.
UNITED STATES OF AMERICA.

APPEAL FROM the United States District Court for the District of Minnesota.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Harry B. Nordstrom, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

May 20, 1966

Order entered in accordance with Opinion:

ROBERT C. TUCKER
Clerk, U. S. Court of Appeals
for the Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY B. NORDSTROM,
Defendant.

No. 3-65-Cr. 4

Hartley Nordin, Assistant United States Attorney,
Attorney for Plaintiff
Lawrence J. Hayes and *Joseph A. Maun,* Attorneys
for Defendant

FINDINGS

1. The defendant has been charged with the wilful evasion of Federal income taxes for the calendar years 1958 through 1961 (Counts I through IV of the Indictment).

2. Defendant waived jury trial and the matter was tried to the Court. The Court heard testimony on July 7, 8, 9 and 12, 1965.

3. In years 1958 through 1961 defendant obtained funds approximating $84,000 which he did not report as income and upon which he paid no tax.

4. The last money obtained by defendant, in the amount of $10,693.80, which was not reported as income and upon which he paid no tax, was obtained on May 12, 1961.

5. During the four taxable years defendant was the director of purchases for the Great Northern Railway Co. (Railway).

6. Under the Railway's Code of Organization the defendant under the direction of the Vice President, Executive Department, was responsible for purchasing all materials.

7. In nine of ten transactions in the years 1958 through 1961 defendant prepared, or caused to be prepared, a false line inspection report for the purchase of ties from one H. E. Simpson of Kalispell, Montana.

8. Defendant prepared, or caused to be prepared, a Railway Department Voucher which was attached to the Line Inspection Report. Defendant certified, or caused to be certified, on the voucher form that the account had been incurred for the benefit of the Railway. The voucher bore further certifications by members of the accounting department and approval for payment by the Vice President and Comptroller, who was the head of the accounting department.

9. The defendant prepared, or caused to be prepared, a Railway check which was attached to the Line Inspection Report and the Department Voucher. The Vice President and Comptroller indicated on the check "audited and approved" and added his signature. The check became a paying instrument for the Railway and for the benefit of the payee on the signature of the Treasurer of the Railway or by someone authorized by him to execute the check as drawer.

10. In one transaction (Exhibit #18) defendant prepared, or caused to be prepared, a false Line Inspection Report involving a 1% discount purchase. The defendant submitted a list of purchases, with draft vouchers attached, to the accounting department. Defendant certified, or caused a certification, that the purchases had been made. The draft voucher

(cash audit voucher) was approved for payment by the Vice President and Comptroller and was directed to the Treasurer of the Railway and payable through the First National Bank of St. Paul.

11. In no case did the defendant sign or have authority to sign for the Treasurer or the Vice President and Comptroller the check or the draft voucher.

12. In all ten transactions the defendant requested, or caused to be requested, the return of the paying instruments to him.

13. In none of the ten transactions were ties delivered to the Railway by Simpson.

14. In none of the ten transactions did Simpson receive any of the proceeds.

15. In all ten transactions the paying instruments with Simpson shown as payee were delivered to defendant.

16. In all ten transactions defendant forged the signature of Simpson, obtained the funds represented by the paying instrument, and converted the proceeds to his own use.

17. The Railway has filed civil suit against the defendant for recovery of the funds obtained by the defendant.

18. The funds which the defendant obtained and which he converted to his own use were funds of the Railway, his employer.

19. The funds represented by the checks which defendant forged were not owned or possessed by Simpson or any other third party.

20. Railway relied on defendant's position, certifications and supporting documents.

21. Railway trusted defendant with possession of the checks. Railway's trust was misplaced.

22. Defendant embezzled money or property of his employer (Railway).

23. Count IV of the Indictment charges that the defendant on or about March 29, 1962, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States by filing and causing to be filed with the District Director a false and fraudulent joint income tax return on behalf of himself and his wife, wherein it was stated that their taxable income for said calendar year was the sum of $27,182.62, and that the amount of tax due and owing thereon was the sum of $7,999.27, whereas as he then and there well knew, their joint taxable income for the said calendar year was the sum of $37,807.72 upon which said taxable income there was owing to the United States an income tax of $13,134.60.

24. Defendant executed the tax return for the calendar year 1961 on March 29, 1962, and filed it thereafter with the District Director of the Internal Revenue Service in St. Paul. In his return for the year 1961 defendant did not include embezzled funds of $10,693.80 obtained on May 12, 1961.

25. A substantial additional amount of income tax was due and owing for the calendar year 1961 over and above the amount of tax which was declared in defendant's tax return for that year.

26. Defendant knew that some additional income tax of a substantial amount was due and owing by him to the United States for the calendar year 1961 over and above the amount of the tax which was disclosed in his tax return for that year.

27. Defendant wilfully attempted to evade or defeat such additional tax with the specific intent to defraud the United States of such additional tax.

28. Defendant wilfully and knowingly attempted to evade or defeat a large part of the income tax due and owing by him for the calendar year 1961.

29. On or about March 29, 1962, defendant filed a false and fraudulent income tax return by failing to include therein substantial income which he knew he had received during the calendar year 1961.

30. The offense of wilfully and knowingly attempting the evasion or defeat of a large part of the income tax owing by defendant for the calendar year 1961 by the filing of a false and fraudulent tax return was complete on or about March 29, 1962, when the fraudulent return was filed.

31. The United States has proved beyond a reasonable doubt every essential element of the crime charged in Count IV of the Indictment.

The Court finds the defendant not guilty on Counts I, II and III of the Indictment and guilty on Count IV of the Indictment.

EARL R. LARSON
United States District Judge

August 2, 1965.

Memorandum Attached.

MEMORANDUM

Defendant was a trusted agent of the employer Railway. Through fictitious line inspection orders he initiated the process by which Railway funds came into his possession. Because he was a trusted employee his requests for the return of checks payable to Simpson were honored. Because of his position and because of the trust in him he was given possession of the Company checks which he proceeded to forge, obtain the funds and convert them to his own use. He

was thus guilty of embezzlement and forgery, for which crimes apparently he has not been prosecuted. Fraud or a fraudulent scheme may be necessary to accomplish the result. The crime is nonetheless embezzlement.

Embezzlement is "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *Moore v. U. S.*, 160 U.S. 268. The crime of embezzlement by an agent is "the receipt by agent of money of his principal and conversion of funds to his own use." *Berra v. U. S.*, 221 F. 2d 590 (8 Cir.). As between the Railway (principal) and the agent (defendant) the Railway owned the funds which came to defendant solely by virtue of the special trust and confidence reposed in him by his principal. The violation of that trust and the conversion by defendant of the funds to his own use made him an embezzler. *Groves v. U. S.*, 343 F. 2d 850 (8th Cir. 1965).

The Court has found the defendant not guilty of criminal tax evasion in Counts I, II and III of the Indictment which relate to the calendar years 1958 through 1960, though defendant received money constituting economic gain in those years.

The Court as to those years has applied the rules of *Commissioner v. Wilcox*, 327 U.S. 404, *Rutkin v. U. S.*, 343 U.S. 130, and *James v. U. S.*, 366 U.S. 213.

The United States Supreme Court said in *Wilcox* in 1946 that embezzled monies were not subject to tax because they were not received under any claim of right and that there was an obligation to repay the funds. In *Rutkin* in 1952 the Court decided that extorted money was subject to tax and limited *Wilcox* to its facts. Trial and appellate courts struggled with these decisions. Some courts felt that *Rutkin* said

that *Wilcox* was wrongly decided. Some found defendants guilty by finding something close to but not embezzlement itself.

Influenced perhaps by these decisions, the Supreme Court on May 15, 1961, clearly reversed *Wilcox* and ordered dismissal of the indictment. In 1955 the United States Supreme Court had refused certiorari in the case of *Dix v. Com'r*, 223 F. 2d 436, in which the Second Circuit held that embezzled funds were not taxable as income.

The Court in *James* did say that *Rutkin* "thoroughly devitalized" *Wilcox* and that the *Wilcox* rationale was "effectively vitiated" by *Rutkin*. The Court in *Rutkin* did not, however, overrule *Wilcox*.

As to Counts I, II and III defendant therefore benefits from the *Wilcox* decision which in 1961 the United States Supreme Court in *James* says was wrongly decided.

Count IV relating to the calendar year 1961 for which a tax return was filed on or about March 29, 1962, presents a different problem. Defendant embezzled his last money on May 12, 1961, and paid no tax on that income.

This embezzlement occurred just three days before the decision in *James*. The defendant argues that since the money embezzled was not income for tax purposes on the day he received it, he cannot be guilty of wilfully failing to report it. That argument ignores the fact that the only offense with which the defendant is presently charged is a wilful attempt to evade paying his taxes.

That offense was committed in 1962 when the defendant filed his tax return covering the year 1961.[1] The statute of limitations could not even start to run until after the period allowed for filing a 1961 return had elapsed on April 15, 1962.[2]

The *James* case merely holds that a taxpayer who filed a return prior to *James* which did not list income received by embezzlement could not be convicted of "willfully" attempting to evade the payment of his income taxes. But *James* made it very clear that money received by embezzlement is income for Federal tax purposes. The law on this was clear during the entire period in which the defendant was preparing his 1961 tax return.

In determining whether the defendant's conduct can be considered wilful, it is obviously the law at the time the offense is committed which is important. The fact that the money embezzled by the defendant would not have been classed as taxable income on the day he received it if a tax return had been required at that time is irrelevant. The defendant is only charged with tax evasion, a crime committed many months after his legal liability for taxes on embezzled funds became clear.

EARL R. LARSON

FOOTNOTES

1. *Myres v. United States*, 174 F. 2d 329, 334 (8th Cir.), *cert. denied* 338 U.S. 849 (1949); *Swallow v. United States*, 307 F. 2d 81, 83 (10th Cir. 1962).
2. 26 U.S.C. §§ 6513, 6531 (1964). Cf. *Jaben v. United States*, 381 U.S. ——, 85 S. Ct. 1365 (1965), aff'g 333 F. 2d 535 (8th Cir. 1964).